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Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* OF THE UNITED STATES CATHOLIC CONFERENCE, THE CHRISTIAN LIFE COMMISSION, SOUTHERN BAPTIST CONVENTION, AND THE NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

MARK E. CHOPKO *
General Counsel

PHILLIP H. HARRIS
Solicitor

UNITED STATES CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, D.C. 20017
(202) 541-3300

* Counsel of Record

Of Counsel:
MICHAEL F. MOSES

(Counsel continued inside front cover.)

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MICHAEL K. WHITEHEAD
General Counsel
CHRISTIAN LIFE COMMISSION
SOUTHERN BAPTIST CONVENTION
400 N. Capitol Street, N.W.
Washington, D.C. 20001
(202) 638-3223

FOREST D. MONTGOMERY
Counsel
NATIONAL ASSOCIATION OF
EVANGELICALS
Office of Public Affairs
1023 15th Street, N.W.
Washington, D.C. 20005
(202) 789-1011

Attorneys for Amici

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INTEREST OF *AMICI*

All active Catholic Bishops in the United States are members of the United States Catholic Conference ("Conference"), a non-profit corporation organized under the laws of the District of Columbia. The Roman Catholic Church, the largest religious denomination in the United States, has over 57 million adherents in 20,000 parishes throughout the country. The Bishops' Conference advocates and promotes the pastoral teachings of the Bishops

in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, criminal justice, and the economy. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people throughout the United States. Of the values that the Conference seeks to promote through its participation in litigation, respect for human life is of the highest importance.

The Christian Life Commission ("Commission") is the moral concerns and public policy agency for the Southern Baptist Convention, the nation's largest Protestant denomination, with over 15.2 million members in over 38,000 autonomous local churches. The Christian Life Commission has been charged by the Convention to address public policies affecting the sanctity of human life, the integrity of marriage and the family, and other subjects. Southern Baptists have expressed themselves in repeated resolutions, passed in national conventions over the past two decades, overwhelmingly opposing abortion except to save the life of the mother and calling for the reversal of *Roe v. Wade*, 410 U.S. 113 (1973). The Christian Life Commission seeks to advocate positions consistent with these resolutions by filing briefs as *amicus curiae* in important litigation such as this case.

The National Association of Evangelicals ("NAE") is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. As its official resolutions attest, NAE is committed to defending the sanctity of human life. The NAE, the Commission, and the Conference believe that the practice of abortion-on-demand in this country undermines respect for all life and jeopardizes other vital interests of individuals, the family, and the community. For this reason, any retreat from the review of abortion jurisprudence begun by this Court in *Webster v. Repro-*

ductive Health Services, 492 U.S. 490 (1989), will serve only to confuse the law and derogate other fundamental rights, most especially those of countless unborn children. Because the federal right created in *Roe v. Wade* underlies jurisdiction in this case, reconsideration of that case without further delay is appropriate here.

Through their counsel, the parties have consented to the appearance of these *amici*.

SUMMARY OF ARGUMENT

In 1973, this Court held that its privacy jurisprudence "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. at 153. It did so, however, recognizing that this decision involved more than the decisions given constitutional protection in cases from *Meyer v. Nebraska*, 262 U.S. 390 (1923), to *Griswold v. Connecticut*, 381 U.S. 479 (1965). Abortion involves the termination of a life and the infringement of other personal and community interests. *Roe v. Wade*, 410 U.S. at 159. For this reason, the Court held open the possibility that these interests could not only be balanced against, but at times override, the now protected choice of abortion. In nineteen years of legislative efforts and litigation experience, that prospect has never meaningfully materialized. Society, the family, men, women, and millions of unborn children have suffered exceedingly as a result.

In his concurring opinion in *Roe v. Wade* and *Doe v. Bolton*, 410 U.S. 179 (1973), Justice Douglas discussed the nature of "liberty" as including "*autonomous control over the development and expression of one's intellect, interests, tastes, and personality.*" 410 U.S. at 211 (emphasis in original). This right, the Justice said, is "absolute, permitting of no exceptions." *Id.* No other rights encompassed by his notion of liberty, including the right of privacy, were denominated autonomous, and no other Justice spoke of autonomy in relation to personal liberty or privacy in those first abortion cases. 410 U.S. at 113-223. Yet by the time the Court reached its decision in *Thorn-*

burgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), a majority had come to employ the concept of autonomy in direct relation to a woman's decision to abort her child. 476 U.S. at 772. By so doing, the Court truly caused the pregnant woman to be "isolated in her privacy" from all other legitimate interests of society, of her community, of her family, and of her unborn child—an outcome that *Roe v. Wade* originally disavowed. 410 U.S. at 159. Having been promised "freedom of choice" by abortion's supporters, pregnant women find themselves poorly served by the abortion industry's contrived "autonomy." The result of isolating expectant mothers from the aid and support they need has been to expose them to victimization by an abortion industry that masquerades as operating in their best interests, while in fact it seeks to avoid legitimate state regulation aimed at protecting health and safety.

When Pennsylvania enacted minimal medical regulations for clinics performing abortions, the United States District Court for the Eastern District of Pennsylvania enjoined them at the request of the abortion providers. This result protected abortion notwithstanding the state's legitimate authority to license and regulate medical practitioners in the interest of protecting all patients. *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954). The lower court disregarded this Court's teaching that the states have compelling interests in protecting maternal health, preserving prenatal life, and upholding professional standards. Yet the district judge was only applying the hyperextension of *Roe*, especially the sweeping opinion in *Thornburgh*. That decision completed the distortion of the law begun in *Roe*, and its demise as precedent would be a healthy step. For this reason, this Court must complete the process begun in *Webster v. Reproductive Health Services*.

The primary problem lies not in *Thornburgh*, whose abandonment is presaged by *Webster*, but in *Roe v. Wade* and the collapsing foundation on which it was based. To explain its original extension of the constitutional right

of privacy to abortion, this Court had to engage in speculation as to how certain perceived medical, social, or psychological "detriments" to pregnant women might be alleviated by abortion. *Roe v. Wade*, 410 U.S. at 153. This nation's experience shows that those predictions were unfounded. Unsafe abortion, maternal and infant mortality, family instability, teenage pregnancy, and similar difficulties continue unabated. Widespread abortion has not solved such problems. Indeed, abortion has created its own list of unexpected and undesirable detriments to our society. The only solution for this Court is not to entrench its decisional law further, but to reconsider its rationale for including abortion within the Due Process Clause of the fourteenth amendment. The Court can and should do so because subject matter jurisdiction over this case depends upon abortion remaining a constitutional right. In order for the Court to examine properly its own jurisdiction, as it is bound to do in every case, *Roe v. Wade* must be reconsidered and should, on reflection, be abandoned.

ARGUMENT

I. BEFORE ADDRESSING THE MERITS OF THIS CASE, THE COURT SHOULD RECONSIDER *ROE v. WADE*.

Since November 7, 1991, when petitioners and their counsel publicly announced their strategy for filing a petition for certiorari in this case, there has been rampant speculation across this nation as to whether *Roe v. Wade* would, could or should be reconsidered. For the most part, however, prognosticators have ignored the fundamental fact that subject matter jurisdiction is always open to review, and that jurisdiction over this case depends on this Court's decision in *Roe v. Wade*.

Without discussion, the district judge proclaimed, "I have subject matter jurisdiction over this controversy pursuant to 28 U.S.C. § 1331 (1966 and 1990 Supp.), 28 U.S.C. § 1343(a)(3), (4) (1976 and 1990 Supp.), and the fourteenth amendment to the United States Constitu-

tion." *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1325 (E.D. Pa. 1990). The court of appeals opinion, on review here, abbreviates but essentially reiterates the district court's jurisdictional proclamation. *Planned Parenthood v. Casey*, 947 F.2d 682, 687 (3rd Cir. 1991), *cert. granted*, 112 S. Ct. 931 (1992). Yet this Court has stated that:

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it.

Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)). Every federal court is therefore obliged to examine its subject matter jurisdiction, whether the issue is raised by a party, a witness, an intervenor, an *amicus curiae*, or by the court itself. The question of jurisdiction is so "fundamental" that "the court is bound to ask and answer [it] for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Bender*, 475 U.S. at 547 (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

The abortion cases filed in federal courts since the Court's decision in *Roe v. Wade* have relied, as this case does, on 28 U.S.C. §§ 1331 and 1343 for federal jurisdiction. Those statutory provisions require, of course, a "deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States" or a claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1343 (a)(3) and 1331. Because of this Court's pivotal holding in *Roe v. Wade* that the constitutional "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," federal courts presume that the jurisdictional requirement of a constitutional deprivation or claim is always extant where

abortion is involved. In fact, many parties do not even raise the issue, concentrating instead on other jurisdictional issues such as plaintiffs' standing, as the parties in this case did below.[1]

Prior to *Roe v. Wade*'s elevation of abortion to constitutionally protected status, federal jurisdiction over abortion cases was not at all clear; lower courts cited one another for assurance that they ought even to entertain these complaints. *See, e.g., Doe v. Bolton*, 319 F. Supp. 1048, 1052 (N.D. Ga. 1970) and *Doe v. Scott*, 310 F. Supp. 688, 689 (N.D. Ill. 1970). This Court has itself assumed jurisdiction in several abortion cases, beginning with *Doe v. Bolton*, 410 U.S. 179 (1973), without ever mentioning that subject matter jurisdiction is wholly dependent on the continued efficacy of *Roe v. Wade*'s central holding.[2] Such silence, however, is decidedly not a binding jurisdictional decision. As this Court noted in another action brought under 28 U.S.C. § 1343:

> Moreover, when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us. We therefore approach the question of the District Court's jurisdiction to entertain this suit as an open one calling for a canvass of the relevant jurisdictional considerations.

Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974) (citations omitted). Similarly, this Court is now faced with a consideration of federal jurisdiction under 28 U.S.C. §§ 1331 and 1343; indeed, the obligation to address the issue "is inflexible and without exception," applying "in

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[1] *See, e.g.*, Defendants', Robert P. Casey's, *et al.*, Pretrial Memorandum of Law (filed July 20, 1990) at 3-4; *see also Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. at 754-55.

[2] In both *Thornburgh*, 476 U.S. at 759, and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983), this Court reaffirmed *Roe v. Wade* without commenting upon the jurisdictional ramification of that holding.

all cases" and "[o]n every writ of error or appeal." *Bender*, 475 U.S. at 547 (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. at 382). In proceeding then to "canvass all relevant jurisdictional considerations," the Court must begin with studied reconsideration of its decision in *Roe v. Wade*, for it is that decision upon which federal jurisdiction rests.

II. THE COURT'S APPLICATION OF PRIVACY PRINCIPLES TO ABORTION IN *ROE v. WADE* WAS FUNDAMENTALLY FLAWED.

In undertaking reconsideration of *Roe v. Wade*, this Court should be guided by its line of privacy cases predating this Court's legitimization of abortion-on-demand. Those precedents show proper balance of individual and societal interests—allowance for personal liberty within a framework that protects human life, respects family relationships, promotes the common good, and preserves our free society. Historically, it was always understood that liberty to engage in certain personal actions is not license. In *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905), Justice Harlan, writing for the majority, explained:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good . . . . Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

Although the ability to make certain choices was sometimes given constitutional foundation, often under the Due Process Clause of the fourteenth amendment, this Court has always done so in balance with legitimate, sometimes competing interests rationally related to the

choice. *E.g., Allgeyer v. Louisiana*, 165 U.S. 578 (1897).[3] Protection of basic constitutional values has been the Court's dominant adjudicative principle.[4]

The early debate on what became the privacy doctrine in this century occurred during the process of incorporating "federal" rights to the states through the fourteenth amendment. In a seminal decision, *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court articulated the necessary standard to distinguish those rights "incorporated" from those "unincorporated." The "incorporated" rights were not necessarily enumerated in the Constitution but were those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 326. Only those liberties "found to be implicit in the concept of ordered liberty" were incorporated.[5] *Id.* at 591.

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[3] In *Allgeyer*, the Court found that there was certainly a basic right to engage in business contracts as an element of personal liberty that deserved to be protected. But for purposes of this discussion, it should be noted that the Court did "not intend to hold that in no such case can the State exercise its police power." Indeed the Court found that this fundamental right "may be regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes. . . ." *Allgeyer v. Louisiana*, 165 U.S. at 591.

[4] Throughout its cases, the Court has engaged in an effort to apply faithfully those values. Justice Harlan in *Jacobson v. Massachusetts* (197 U.S. at 22) cites approvingly Chief Justice John Marshall in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819) for the idea that the spirit of the Constitution "is to be collected chiefly from its words."

[5] The *Palko* Court employed "freedom of thought" as its primary example: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." 302 U.S. at 327. In his concurring opinion in *Roe v. Wade*, Justice Douglas states that such internal matters as thought or belief are integral to one's autonomy and not subject to *any* infringement by the State. 410 U.S. at 211. Other interests, like the interest in one's health and well-being, are subject to appropriate regulation. *Id.* at 211-14.

In his famous dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961), Justice Harlan said that the search for fundamental constitutional values was intended to be a "rational process" that must reflect the "traditions of the country, not judges." He found that personal liberty was somewhat of a "continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ." *Id.* at 543. In that language, endorsed by a plurality in *Moore v. City of East Cleveland*, Justice Harlan acknowledged that protection of personal liberty often required a balance of different interests.[6] By protecting liberty against "substantial arbitrary" and "purposeless" restrictions, the Court invited express consideration of countervailing interests. In the abortion context, however, the invitation has not, until recently, even been acknowledged, much less accepted.

A. Abortion Is A Threat To The Preservation Of A Legitimate Sphere Of Protected Privacy.

Until *Webster v. Reproductive Health Services*, a majority had characterized itself as protecting a "promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh*, 476 U.S. at 772. In actuality, that (now former) majority separated privacy doctrine from its roots. Although it claimed to the contrary, the Court isolated the pregnant woman in her privacy from all other interests. The Court originally offered a number of rationales—legal, medical and social—for so doing. Although these rationales when first offered in 1973 were debatable, on further consideration and through actual, lamentable experience, they have been largely unrealized.[7] What is needed now is thorough reconsideration of that illegitimate foundation upon which constitutional abortion in America has rested for the last nineteen years.

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[6] *Moore v. City of East Cleveland*, 431 U.S. 494, 501-502 (1977).

[7] Chopko, Harris, Alvaré, "The Price of Abortion Sixteen Years Later" 69 *National Forum* 18 (Fall 1989).

Before *Roe*, privacy jurisprudence consisted of a number of discrete cases protecting either certain private places, private relationships, or private spheres of life from unwarranted government intrusion.[8] The shift in privacy jurisprudence that led to *Roe* began with *Griswold v. Connecticut*, when this Court held for the first time that there exists a specific right of privacy formed by "emanations from those [constitutional] guarantees that help give them life and substance."[9] Yet *Griswold* still dealt with marriage, a protected association, and thus did not stray as far from the substance of the Court's earlier conclusions as it implicitly did from the Court's rationale. Where judicial protection of privacy lost any legitimate link with either this Court's precedents or with the Constitution itself was *Eisenstadt v. Baird*, 405 U.S. 438 (1972).[10] *Eisenstadt* abandoned the protectable right of privacy as developed in constitutional litigation by suggesting that personal interests alone—not relational interests such as those at the heart of *Griswold*—are entitled to special protection. 405 U.S. at 453. Having put marriage asunder in *Eisenstadt*, the Court in *Roe* undermined protection for the fruits of marriage—children.

As the majorities in the abortion cases erected a series of "substantial arbitrary impositions and purposeless restraints" on virtually every competing interest, the Court turned legitimate privacy doctrine on its head.[11] *Poe v.*

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[8] *E.g. Terry v. Ohio*, 392 U.S. 5 (1968); *Loving v. Virginia*, 388 U.S. 1 (1967); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[9] *Griswold v. Connecticut*, 381 U.S. 478, 483 (1965).

[10] J. Noonan, *A Private Choice: Abortion in America in the Seventies* 20-22 (1979); *see generally* M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* 56-57 (1991).

[11] For example, it is widely recognized that parents have a general right to protect their children from potential adverse consequences of medical decisions. *Parham v. J. R.*, 442 U.S. 584, 604 (1979) (analyzing and rejecting *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)). Yet, in the abortion area, parents do not

Ullman, 367 U.S. at 542. By stretching privacy doctrine until it was broad enough to cover abortion, the Court introduced a flaw into its jurisprudence that, in subsequent opinions culminating in *Thornburgh*, became a threat to the very constitutional values and legitimate societal interests the right of privacy was originally meant to protect. When a bare majority of this Court used "autonomy" to describe a woman's decision to abort her child,[12] the very principle of liberty under the fourteenth amendment was infected with an amorphous concept that threatens the right to privacy itself. "Privacy reduced to its extreme is isolation, one of the conditions conducive to the success of totalitarian movements. It is the intention of free states to recognize and protect an area of privacy for the citizen but not to reduce that privacy to isolation." [13] A completely autonomous person becomes a law unto herself; privacy is "reduced to its extreme" and the shared commitment to values necessary to the preservation of a free state is impaired. The results are rifts in the jurisprudence and in the fabric of society.

B. Abortion Is A Threat To The Community Values Necessary To A Free Society.

In perhaps its most candid observation about the nature of the "right" being established in *Roe v. Wade*, the majority specifically recognized that the decisionmaking process it was about to protect differed, in its basic char-

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have the ability to exercise the same fundamental freedom. Thus has Justice O'Connor observed that, in the area of abortion, different rules come into play and nothing is safe from "ad hoc nullification" at the hands of a majority. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 814 (O'Connor, J., dissenting). As shown in Argument III, even traditional principles of informed consent have been abrogated in the abortion context. *See id.* at 798-804 (White, J., dissenting).

[12] *Thornburgh*, 476 U.S. at 772.

[13] S. Jordan, *Decision Making for Incompetent Persons* 132-33 (1985).

acter, from those decisions protected in the line of cases from *Meyer* to *Griswold*. *Roe v. Wade*, 410 U.S. at 159. Even while stating that obvious fact, the Court nonetheless framed the discussion in language that would enable subsequent majorities to run roughshod over other individual, familial and community interests deserving protection, not derision. *E.g.*, *Thornburgh*, 476 U.S. at 772; *Colautti v. Franklin*, 439 U.S. 379 (1979). The *Roe* Court's promise that maternal health, medical standards and "potential life" would be considered alongside abortion proved empty. 410 U.S. at 154. Indeed, that Court's statement that the abortion right was not to be absolute has itself been termed disingenuous because, from the beginning, no rights could be asserted on behalf of the unborn child.[14]

Individuals do have truly private choices—decisions that are entirely personal—that do not affect the interests of others or of the state. In other instances, individuals have their choices protected from interference by the state, whether they concern religious preferences,[15] the education of children,[16] the choice of a spouse,[17] or similar interests. It makes sense that the state should have a heavy burden of proof to engage in restriction of individual choices where there are no third-party or societal interests at stake. This may also be true when the exercise of individual choice falls completely within the context of a protected relationship, like marriage or the family.[18] Yet even in these relationships, the state has regulatory authority, severely circumscribed, but sufficient to ensure that individual choices are worked out in

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[14] M.A. Glendon, *Rights Talk*, *supra* note 10, at 61.

[15] *West Virginia State Board v. Barnette*, 319 U.S. 624 (1943).

[16] *Meyer v. Nebraska*, 262 U.S. at 396-403; *Pierce v. Society of Sisters*, 268 U.S. at 529-36.

[17] *Loving v. Virginia*, 388 U.S. at 2-13.

[18] *Griswold v. Connecticut*, 382 U.S. at 486; *Prince v. Massachusetts*, 321 U.S. at 166.

a balance respectful of all members of the protected relationship.[19]

In considering abortion, however, the calculation is never simply one of individual interests competing with interests of the state. The abortion decision is complex and certainly affects the life interests of others: the unborn child, the father, other members of the family, and society itself. The decision implicates the procreative interests of both partners, affects the integrity of the marriage relationship, and *ends a life*.[20] When a minor becomes pregnant, abortion has other detrimental impacts on family relations, alienating the child from her parents and separating those parents from their unborn grandchild. A constitutional right to abortion subjugates liberties that in other contexts are found to be fundamental, but in this context are considered less worthy of protection.[21]

In *Webster v. Reproductive Health Services*, a plurality of the Court suggested that it is not always wise to distinguish between abortion as a "fundamental right" or as a "limited fundamental constitutional right" or as a "liberty interest protected by the Due Process Clause . . . ." 492 U.S. at 520. The plurality made this assertion while discussing "the State's interest in protecting potential human life," where that interest is "compelling" and exists "throughout pregnancy." *Id.* at 519. In that context, where the state's compelling interest would prevail no matter how the right is denominated, such distinctions may be unnecessary to the Court's conclusion. However, it seems unlikely that this Court still seriously seeks to defend its unrestricted abortion decisions. Therefore, using the historical line of privacy cases, this Court must

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[19] *Prince v. Massachusetts*, 321 U.S. at 166-67.

[20] Ours has always been a society that "strongly affirms the sanctity of life." *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

[21] J. Noonan, *A Private Choice*, *supra* note 10, at 90-95, 190.

reflect accurately that one person's "liberty" is not "license" to control even one's own body where another's interest could suffer or the common good be diminished.[22] *Jacobson v. Massachusetts*, 197 U.S. at 26-27. Because the other vital interests, the unborn child, will suffer death as a result of an exercise of "liberty," the Court must reexamine its basis for making abortion a matter of due process at all.[23]

While debating how to denominate abortion, it is well to remember that the right to life has been recognized as the first right protected by government.[24] The order is not accidental. The right to life is the logical and chronological starting point in any discussion of the fundamental rights of persons. All other rights, interests, and values protected by the state on behalf of its citizens are mean-

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[22] Nor is liberty to be equated with autonomy; the illegitimate concept of bodily autonomy must be left out from under the umbrella of the fourteenth amendment in order to preserve those rights that *are* properly within the sphere of constitutional liberty interests. *See* Argument II. A., *supra*.

[23] As Professor John Hart Ely noted almost twenty years ago:

> What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure . . . . At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.

Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*" 82 Yale L.J. 920, 935-37 (Apr. 1973).

[24] The Declaration of Independence places the right to life first in the list of inalienable rights. The fourteenth amendment lists the right to life first among those rights of which the states cannot deprive a person, without due process. And Thomas Jefferson's March 31, 1809, letter to the Republican Citizens of Washington County, Maryland, stated that: "The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government." 8 *The Writings of Thomas Jefferson* 165 (H.A. Washington, ed.) (1871).

ingless if one does not first possess the right simply to exist. The fourteenth amendment guarantees this foundational value by denying to the states the power to "deprive any person of life, liberty, or property, without due process of law." Since the addition of those thirteen words to the Constitution, this Court has struggled with the scope and meaning of the word "liberty." *Compare, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968), *with id.* at 162 (Black, J., concurring), *and id.* at 215 (Harlan, J., dissenting). Yet it is plain that "life" is the necessary prerequisite to the exercise of "liberty" and it is through pregnancy that each of us begins to live.

III. THE MEDICAL REGULATION ISSUES IN THIS CASE EXEMPLIFY THE JURISPRUDENTIAL PROBLEMS ENGENDERED BY *ROE v. WADE*.

This Court has developed an abortion jurisprudence which minimizes one salient fact about abortion: regardless of when it is performed, abortion is a surgical procedure that has consequent medical risks and complications. Under *Roe v. Wade*, it was supposedly within a state's authority to regulate abortion because such regulation served legitimate interests in health and safety *and* in maintaining medical standards. 410 U.S. at 155. That supposition has been largely ignored in the face of consistent efforts by states to assert those interests.

In part, the state's interest in ensuring high standards for the medical profession also advances the protection of maternal health. *See, e.g., Akron v. Akron Center for Reproductive Health*, 462 U.S. at 428-29 (assuming without discussion some relation of the two interests); *Roe v. Wade*, 410 U.S. at 163. The maintenance of medical standards is also related to the state's interest in protecting the unborn child. *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 486 (1983) (upholding second physician requirement). But beyond these aspects, the interest in regulation of the medical profession by itself justifies reasonable supervision of the physician-patient relationship throughout pregnancy under the state's wel-

fare authority.[25] *See, e.g., Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (*per curiam*) (upholding physician licensing requirements); *Planned Parenthood v. Danforth*, 428 U.S. at 67 (upholding informed consent requirement); *see also Akron*, 462 U.S. at 460 and nn. 6 & 7 (O'Connor, J., dissenting).

A. The Abortion Industry Has Been Arbitrarily Exempted From Effective State Regulation.

"I had thought it clear," Justice White wrote in *Thornburgh*, "that regulation of the practice of medicine, like regulation of other professions . . . , was a matter peculiarly within the competence of legislatures . . . ." 476 U.S. at 802 (White, J., dissenting); *see also id.* at 783 (Burger, C.J., dissenting). And indeed, before the Court in *Roe v. Wade* threw into doubt constitutional principles it had previously espoused, *id.* at 814 (O'Connor, J., dissenting), regulation of the medical profession in the interest of public welfare was not only a legislative prerogative but a public duty. *See generally Semler v. Board of Dental Examiners*, 294 U.S. 608, 612 (1935). Viewed in this light, Pennsylvania's informed consent, waiting period, and parental and spousal notification requirements are valid exercises of state authority to regulate abortion.[26]

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[25] The authority of a state to license and regulate the practice of medicine is a "vital part of a state's police power." *Barsky v. Board of Regents*, 347 U.S. at 449. *See Bigelow v. Virginia*, 421 U.S. 809, 827 (1975). A licensed physician has no right to practice medicine according to his or her own unfettered judgment but rather is subject to reasonably exercised but extensive authority. *Whalen v. Roe*, 429 U.S. 589, 604 (1977); *see Friedman v. Rogers*, 440 U.S. 1, 9-10 (1979) (Powell, J.) (first amendment interest in medical service name). *See also Brophy v. New England Sinai Hospital*, 398 Mass. 417, 497 N.E.2d 626 (1986); *In re Guardianship of Grant*, 109 Wash.2d 545, 747 P.2d 445 (1987), and cases cited therein (states' interest in the integrity of the medical profession).

[26] Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3205-3206, 3209 (West 1983 & Supp. 1991).

1. *Informed Consent.*

One classic application of the state's regulatory authority over the medical profession has always been the protection of a citizen's right to be informed before consenting to any surgical procedure. In *Dent v. West Virginia*, 129 U.S. 114, 122 (1889), this Court observed:

> The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as deception and fraud.

Accord Meffert v. Packer, 66 Kan. 710, 714 (1903), *aff'd mem.*, 195 U.S. 625 (1904). Consistent with this Court's decision in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, state legislatures have not hesitated to act when they find that the medical community is not providing minimally adequate information to patients.[27]

New York, for example, requires that information be provided to pregnant women about the potential adverse impact of medication used during pregnancy and delivery,[28] and to parents about metabolic disorders in their newborns.[29] Florida has enacted legislation designed to guard against too frequent use of electroconvulsive (shock) therapy by adding new consent requirements.[30] Several states have enacted laws requiring that physi-

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[27] *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 750-51, 765 (1976).

[28] N.Y. Public Health Law Ann. § 2503 (McKinney 1985). This gives the woman the right to be informed, in advance of delivery, of the drugs that the physician expects to use during pregnancy and at birth.

[29] *Id.* § 2500-a (McKinney 1985 & Supp. 1992).

[30] Fl. Stat. Ann. § 458.325 (West 1991).

cians provide vicims of breast cancer oral or written summaries of the various alternative treatments prior to assent to any particular procedure.[31] More recently, a number of jurisdictions have enacted legislation requiring that patients be adequately informed before undergoing testing for the human immunodeficiency virus (HIV).[32] These are examples of measures that directly affect the physician-patient relationship by shaping the content of their dialogue.

It follows that Pennsylvania acted well within the authority traditionally accorded to states in this area when it enacted the informed consent statute.[33] In *Akron v.*

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[31] *See, e.g.*, Fl. Stat. Ann. § 458.324(2) (West 1991); *see also* N.Y. Public Health Law Ann. § 2505 (McKinney 1985) (requiring information about infant nutrition and breast-feeding); Mass. General Laws Ann. c. 123, § 23 (West Supp. 1991) (regarding informed consent by mental patients to shock treatment or lobotomy).

[32] Ala. Code § 22-11A-51 (Michie Supp. 1991); Ariz. Rev. Stat. Ann. § 20-448.01 (West Supp. 1991); Colo. Rev. Stat. § 10-3-1104.5 (Supp. 1991); Fl. Stat. Ann. § 381.004 (West Supp. 1992); Hawaii Rev. Stat. Ann. § 325-16 (Michie 1991); Ind. Stat. Ann. §§ 16-8-7-6, 16-8-7.5-14 (Burns 1990); Ky. Rev. Stat. Ann. §§ 214.181, 214.625 (Michie 1991); Md. Health Gen. Code Ann. § 18-336 (Michie 1990); N.H. Rev. Stat. Ann. § 141-F:5 (1990); N.M. Stat. Ann. § 24-2B-2 (1991); N.D. Cent. Code Ann. §§ 23-07.5-02, 23-07.5-03 (Michie 1991); Or. Rev. Stat. § 433.045 (1991); Va. Code Ann. § 32.1-37.2 (Michie Supp. 1991); Wis. Stat. Ann. § 146.025 (West 1989 & Supp. 1991).

[33] The parental consent and spousal notification requirements are similarly within the State's authority. Our legal tradition strongly endorses and preserves the mutual support and interdependence of family members—goals served by the Pennsylvania statutes. Society owes much of its stability to the strength of the family and has a vital interest in preserving family integrity. "The intangible fibers that connect parent and child have infinite value. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). Indeed, "the Constitution protects the sanctity of the family precisely because the institution

Akron Center for Reproductive Health, this Court found unobjectionable certain information relevant to an informed choice, *i.e.*, the status of one's pregnancy, the availability of community and other resources, the existence and efficacy of alternatives to abortion and public assistance, and the particular risks and benefits of options available to the woman. 462 U.S. 416, 445-46 & n.37 (1983). The kind of information Pennsylvania would require be provided to pregnant women seeking an abortion, like the information described in *Akron*, is "the kind of balanced information . . . all could agree is relevant to a woman's informed choice." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. at 830 (O'Connor, J., dissenting).

2. *24-Hour Waiting Period.*

The information which Pennsylvania law requires be provided to a pregnant woman seeking an abortion, standing alone, does not ensure that her *consent* will be truly informed. For this to occur, a woman must have a meaningful opportunity to consider all the information she has been given and make a decision based on it. The Pennsylvania statute preserves that opportunity by requiring that 24 hours lapse from the time information is provided until the abortion is performed. The 24-hour waiting period is an attempt to ensure that the provision of information will not be a merely *pro forma* requirement, but will allow for genuine reflection on the woman's part. Except perhaps in cases of medical emergency,[34] patients contemplating a life-affecting medical procedure

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of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. at 503.

[34] The 24-hour waiting period does not apply in cases of medical emergency. Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. § 3205.

wisely take some period of time to consider their options.[35] Physicians often insist on as much.[36]

Even possible "delay[s] of a week or more" [37] did not lead this Court to invalidate a parental notification and judicial bypass statute. *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990). The 24-hour waiting period should not be troublesome to this Court in light of its holding that greater delays do not result in a *de facto* violation of the Constitution. The waiting period furthers a legitimate state interest; it protects patients who otherwise would not be provided, or would not avail themselves of, the opportunity of taking even a brief period of time to weigh information before making a decision.[38] To the extent that some women, after contemplating their options, decide against aborting their children, the waiting period also furthers the state's compelling interest in protecting unborn life.

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[35] Requiring a brief waiting period for major life-affecting medical procedures is not unique to the abortion context. For example, Medicaid regulations for women having sterilization procedures require that "at least 30 days . . . have passed between the date of informed consent and the date of sterilization . . . ." 42 C.F.R. § 441.253(d) (1991). *See also* 42 C.F.R. §§ 441.257(a), 441.258 (1991); 42 C.F.R. Part 441, Subpt. F, App. (1991) (requisite consent form and physician's statement showing that sterilization was performed 30 days or more after the date of consent).

[36] Indeed, petitioners themselves routinely allow some time between a woman's first contact with their clinics and the abortion. *See, e.g.*, 744 F. Supp. at 1335 (options counseling consists of several hours of group sessions); *id.* at 1336 (abortions usually scheduled within one week); *id.* at 1337 (options counseling only available on Tuesdays and Thursdays); *id.* at 1340 (often a one to two week wait to obtain an appointment for an abortion).

[37] *Hodgson v. Minnesota*, 648 F. Supp. 756, 763 (D. Minn. 1986).

[38] Chopko, *"Webster v. Reproductive Health Services:* A Path to Constitutional Equilibrium" 12 Campbell L.R. 181, 216 (Spring 1990).

B. States' Interests In Health And Medical Standards Are Especially Important To The Unborn Child.

Although *Roe v. Wade* held out the prospect of a compelling state interest in the life of the unborn child,[39] it was the *Webster* case that finally offered realistic support for that concern. 492 U.S. at 499-522. Throughout other decisions of this and other courts, this compelling interest has been acknowledged, though not always protected, in varying degree and in differing language.[40] In recent years, however, there has been a new term applied to the unborn child—a term that comes from outside the abortion debate and with which none of the advocates can legitimately disagree. That term is *patient*. *Williams Obstetrics* vii (J. Pritchard & P. MacDonald 16th ed. 1980).

In the 1980's, both the scientific literature[41] and the popular press[42] have heralded the latest medical advances

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[39] *Roe v. Wade*, 410 U.S. at 163.

[40] The use of different terminology by judges and advocates on all sides of the abortion debate is itself a juridical phenomenon. All engaged in these cases have, consciously or unconsciously, adopted the theory that control of the language determines the outcome of the matter. One of the most misleading labels found in the cases is the adjective "potential" as applied after conception. *See, e.g., Webster*, 492 U.S. at 515-16, 519; *Roe*, 410 U.S. at 150-64. Prior to conception, the phrase "potential human life" *might* have some logical relevance when referring to the ovum and the sperm. At conception, however, that potential has been realized. Life exists, and it can only be human. The debate may rage over whether to call this life a fetus or a baby, but actual human life, fully capable of further development, clearly exists. No human being exactly like this one has existed before, and none like it will be conceived ever again.

[41] *See, e.g.*, Daffos, *et al.*, "Prenatal Management of 746 Pregnancies At Risk for Congenital Taxoplasmosis," 318 *New Eng. J. Med.* 271 (Feb. 4, 1988); *Neonatal-Perinatal Medicine: Diseases of the Fetus and Infant* (A. Fanaroff & R. Martin 4th ed.) (1987); B. Spirt, L. Gordon & M. Oliphant, *Prenatal Ultrasound: A Color Atlas With Anatomic and Pathologic Correlation* (1987).

[42] *See, e.g.*, Henig, "Savings Babies Before Birth," *The New York Times* (Feb. 26, 1982) at 18 (Magazine).

in the field of *in utero* diagnosis and treatment. The technology that has led the way to many of these advances is ultrasonography. Using ultrasound signals, physicians are able to scan the womb, producing a sonogram or television-like live image of the child in the womb.[43] With ever-increasing refinements in technique and equipment, they can visually diagnose the baby's condition and, if necessary, perform highly delicate surgical and other procedures. Not only are the infant's external features discernible, but internal organs, heartbeat and blood flow can be examined, and gestational age may be determined.[44]

Innovative treatments now mean that conditions which previously could have proved crippling or fatal to the newborn infant are being treated before birth.[45] Babies delivered prematurely, with extremely low birthweight, are being saved by new high-technology therapy.[46] Maternal behavior and environmental conditions that can affect the development of the unborn child are being studied and treated.[47] Fetal surgery is not only increas-

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[43] Chervenak, *et al.*, "Current Concepts: Advances in the Diagnosis of Fetal Defects," 315 *New Eng. J. Med.* 305-306 (July 31, 1986).

[44] One unexpected but welcome byproduct of the sonogram is its tendency to promote parental bonding with the prenatal child, even in the earliest stages of pregnancy. Fletcher & Evans, "Sounding Boards: Maternal Bonding in Early Fetal Ultrasound Examinations," 308 *New Eng. J. Med.* 392 (Feb. 17, 1983). Once they have seen the living human being inside themselves, some mothers immediately forego thoughts of abortion. *Id.* For this very reason, some abortion supporters openly advise against allowing the mother to see the baby's image for fear she will be discouraged from having an abortion. "Warns of Negative Psychological Impact of Sonography in Abortion" *Ob. Gyn. News* (Feb. 15-28, 1986). Those who advise this course clearly place a higher priority on maximizing abortions than on informed consent or "freedom of choice."

[45] Kolata, "Fetuses Treated Through Umbilical Cords," *The New York Times* (Mar. 29, 1988) at C3.

[46] Callahan, "How Technology is Reframing the Abortion Debate," *Hastings Center Report* 33-34 (Feb. 1986).

[47] *Id.* at 36.

ing, but can even be accomplished by removing the baby from the womb, operating, and then returning the child until the pregnancy comes full term.[48] Such medical achievements have caused at least one defender of *Roe* to admit that "the same skills that can be used to rescue extremely premature newborns can be brought to bear in these cases [saving aborted fetuses]."[49] Thus medical science has reached a point where the fetus is a patient for all purposes, not only *in utero* but post-abortion as well. This medical realization should be reflected in proper legal recognition of the unborn child's unique status.

In one oft-quoted passage from *Harris v. McRae*, this Court noted that abortion is "inherently different from other medical procedures" precisely because it terminates a life.[50] And in *Ashcroft*, Missouri's requirement that a second physician be present to try to save the infant victim of a third-trimester abortion was upheld as a legitimate exercise of state regulation. 462 U.S. at 485. In the *Webster* case, the Chief Justice, in abandoning *Roe*'s trimester approach, said:

> That framework sought to deal with areas of medical practice traditionally subject to state regulation, and

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[48] Longaker, *et al.*, "Maternal Outcome After Open Fetal Surgery," 265 J.A.M.A. 737 (Feb. 13, 1991); Harrison, *et al.*, "Successful Repair in Utero of a Fetal Diaphragmatic Hernia," 322 *New Eng. J. Med.* 1582 (May 31, 1990); "Occasional Notes: Fetal Treatment 1982," 307 *New Eng. J. Med.* 1651 (Dec. 23, 1982); "Medical Progress: Pediatric Surgery," 319 *New Eng. J. Med.* 94 (July 14, 1988). *See also* Blakeslee, "Fetus Returned To Womb Following Surgery," *The New York Times* (Oct. 7, 1986) at C1.

[49] Callahan, *supra* note 46, at 35. The author then raises the question of whether a woman who chooses to abort is entitled only to the end of pregnancy or to a dead fetus. *See Wynn v. Scott*, 449 F. Supp. 1302, 1321 (N.D. Ill. 1978) ("It never could be argued that she has a constitutionally protected right to kill the fetus."), *appeal dismissed, Carey v. Wynn*, 439 U.S. 8 (1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979).

[50] *Harris v. McRae*, 448 U.S. 297, 325 (1980).

> it sought to balance once and for all by reference only to the calendar the claims of the State to protect the fetus as a form of human life against the claims of a woman to decide for herself whether or not to abort a fetus she was carrying.

492 U.S. at 520. Because Pennsylvania's statute falls within the traditional regulation of medical practice, the claim of a right to abort, if any, must be balanced against the unique status of the unborn child as a *patient*, not against the calendar.

Viewed as a patient, the unborn child is entitled to consideration "of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient." *Colautti v. Franklin*, 439 U.S. at 394. The ramifications are obvious and compelling. Prenatal patients cannot protect themselves; cannot be informed or give consent; cannot be made to understand their condition, nor can they choose treatments. Considered from this perspective, the state should be afforded more, not less, latitude to regulate or prevent the surgery known as abortion.

C. States Must Be Allowed To Protect Patients From The Adverse Effects Of Abortion.

Another reason that greater state regulation of abortion is called for is to minimize its other known adverse effects. Two of the many tragic ironies of the jurisprudence begun with *Roe v. Wade* are: (1) it predicted great benefits would flow from abortion, yet never subsequently faced the many resulting detriments; and (2) it held that a woman's health was only of interest to the state after she had been pregnant for at least three months. 410 U.S. at 163. The flaw in this latter point was illustrated by Justice O'Connor in *Akron*:

> The fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not

> follow that the State has no interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible.

462 U.S. at 460. The fallacy identified by Justice O'Connor is remedied by protection of the interest in life throughout pregnancy. *Webster*, 492 U.S. at 520. Indeed, as should have been obvious to the *Roe* majority, protection of women's health is of vital concern at all times. Pregnancy should only heighten, not weaken, this concern. And, as has been demonstrated in the past nineteen years, abortion should raise the level of legitimate state concern even higher.[51]

Despite knowledge of abortion's adverse consequences, persons supporting an "abortion privacy right" often mischaracterize the issue as though it involved only a woman's right to "keep the government out of the bedroom." [52] Some further contend that women's childbearing capacities have been improperly used as a justification for discrimination against them, and that the only effective remedy for this sexism is women's assumption of sole control over every aspect of their reproductive capabilities, including unfettered access to abortion.[53] These assertions are not

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[51] There is little doubt that the abortion decision is life-affecting. This Court has noted that the "emotional and psychological effects of the pregnancy and abortion experience are markedly more severe in girls under 18 than in adults." *H.L. v. Matheson*, 450 U.S. 398, 411 n.20 (1981). The American Psychological Association reported in 1986 that "[c]ompared with adults, adolescents appear to have somewhat more negative responses on average following abortion." *Adolescent Abortion: Psychological and Legal Issues*, Report of the Interdivisional Committee on Adolescent Abortion, American Psychological Association (Univ. of Nebraska Press 1986).

[52] Clift, King, Gonzalez, "Taking Issue With NOW," *Newsweek* 21-22 (Aug. 14, 1989). In the same article a Planned Parenthood consultant comments: "Framed that way, it becomes the all-American message."

[53] *See, e.g.*, Steinem, "A Basic Human Right," *Ms.* 39 (Aug. 1989); B. Harrison, *Our Right to Choose* 199 (1983).

only misleading, they are detrimental to women's dignity, health and well-being.[54] What should be a paramount concern for the health and welfare of the patients—both mother *and* child—is lost.

The widespread practice of abortion since *Roe*, premised on a popular misconception that constitutional privacy equals personal autonomy, has increased pressure upon women to abort for a variety of discretionary reasons. Laboring against these pressures are those who willingly explore numerous alternative means for handling difficult pregnancies.[55] The answer to the problems caused by abortion does not lie in making abortion more available but in efforts to ensure that no woman need ever resort to abortion. The process of change will not be easy. Worthwhile solutions never are. This Court can help begin the turn from a society that condones abortion while ignoring its insidious consequences, to one that protects the health of its citizens and respects the lives of their offspring. Restoring the traditional authority of Pennsylvania and other states to regulate the medical profession in order to achieve these goals is an important first step.

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[54] *See* note 7 and accompanying text, *supra*.

[55] These efforts include, *inter alia*, eliciting additional emotional and financial support from the father, family, and friends, additional social welfare support for families, better employer child care policies, and greater adoption services. National Conference of Catholic Bishops, *Pastoral Plan for Pro-Life Activities: A Reaffirmation* (Nov. 1985).

CONCLUSION

This Court should reconsider its essential constitutional and jurisdictional holdings concerning abortion. The judgment of the court of appeals finding the Pennsylvania Abortion Control Act, Sections 3203 (definition of medical emergency), 3205 (informed consent), 3206 (parental consent), 3214(a) (reporting requirements) and 3207(b) and 3214(f) (public disclosure of clinics' reports) constitutional should be affirmed. The judgment of the court of appeals finding Section 3209 (spousal notice) unconstitutional should be reversed.

Respectfully submitted,

MARK E. CHOPKO *
General Counsel
PHILLIP H. HARRIS
Solicitor
UNITED STATES CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, D.C. 20017
(202) 541-3300

Of Counsel:
MICHAEL F. MOSES

MICHAEL K. WHITEHEAD
General Counsel
CHRISTIAN LIFE COMMISSION
SOUTHERN BAPTIST CONVENTION
400 N. Capitol Street, N.W.
Washington, D.C. 20001
(202) 638-3223

FOREST D. MONTGOMERY
Counsel
NATIONAL ASSOCIATION OF EVANGELICALS
Office of Public Affairs
1023 15th Street, N.W.
Washington, D.C. 20005
(202) 789-1011
Attorneys for Amici

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* Counsel of Record